IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 97, 112

PAUL EGAN,

Petitioner,

vs.

CITY OF AURORA, a municipality under the laws of the State of Illinois, LEO BOUCON, WILLIAM G. KONRAD, H. A. WYETH, SR., WILLIAM B. ROBERTSON, DONALD CURRAN, HERSHELL STOVER, LeROY STROUD, ANTHONY RUKAS, JOHN (JACK) PETEFER, RAY SCHUHOW, JOHN DAY and CHARLES DARLING,

Respondents.

BRIEF IN REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO GRANTING OF A PETITION FOR WRIT OF CERTIORARI

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Foreword:

Ever a zealous lawyer in behalf of his client's cause, the writer of this brief believes that it is the duty of lawyers to conserve the time and energies of courts of review to adhere in his arguments to the truth. On page 2 of respondents' brief they purport to show that the affidavit in question filed in support of their motion to dismiss the complaint shows:

(a) that the real purpose for which the petitioner called the meeting at which he was deprived of speech was an attempt to overthrow the police department with force and arms;

(b) that at the time of his arrest petitioner was attempting the invasion and capture of the duly constituted police department by inciting those in the "crowd";

(c) that the "general public" would have been exposed to injury and loss of life in the event of a disturbance.

The affidavit which appears on pages 13-15 of the Appendix in the court below does not mention any of the matters and things of which the Statement of the Case speaks. The attempt to mislead this court in respect of the contents of this affidavit is wasteful and inexcusable.

The burden on this Court and on adversary counsel is great enough without having to contend with a misstatement of the case. The affidavit in question has been an element of contention throughout this case. We have pointed out to the court below that it does not comply with Rule 56(e) of the Rules of Civil Procedure for United States District Courts in that it does not appear affirmatively that the affiant is competent to testify in respect of the matters therein stated.[1] That is not enough. Here we are confronted with a misstatement of facts in respect of what the affidavit says.

There is no justification for treating this case in terms of state law as the respondents impliedly request this court to do. *Screws* v. *United States*, 325 U.S. 91, 108.

The question here is whether the complaint states a claim on which relief could be granted under U.S.C.A. Title 42, § 1983 and § 1985 because the respondents deprived the petitioner of his right to freedom of speech.

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[1] On a motion to dismiss under Rule 12(a) of the Rules of Civil Procedure for United States District Courts, if an affidavit is filed in support of the motion, it must be treated as a motion for summary judgment under Rule 56.

Meeting the points made by respondents as they appear in their brief:

I.

As the petitioner reads the respondents' brief it concedes that there is a division of authority among the circuits in respect of the supposed immunities which the Court of Appeals for the Seventh Circuit held existent in respect of police officers whose conduct is proscribed by the terms of the critical act. It may be true that one swallow does not make a summer, but it is equally true that two decisions contrary to the decisions of a majority of the circuits does make a conflict of authority between the several circuits. As was pointed out in the *Monroe* case (Docket No. 712 in this court) much more clearly than it was pointed out here, there are other circuits, the decisions of which, sub silento, if not in words, conflict with that of the Seventh Circuit in respect of the liability of police officers under the critical statutes. Moreover, we believe that the decisions in the Seventh Circuit Court conflict with the opinions in *Screws* v. *United States*, 325 U. S. 91 and with the decision of this court in the case of *Williams* v. *United States*, 341 U. S. 97.

The fact that this court has taken the case of *Monroe* v. *Pape, et al* for review is indicative of the importance of this question.

The question of whether or not a municipality is immune from liability under the Civil Rights Act is also important. The case of *Burt* v. *The City of New York, et al*, 156 F. 2d 791 indicates that there is no immunity for cities and municipalities under that act, while the cases cited by the respondents indicate that municipalities have immunity from liability by virtue of state law, notwithstanding that ordinarily state law cannot be permitted to thwart the objectives of federal law where the federal Government is

acting within the scope of its constitutional powers. In addition to all this there is a real question in respect of the communities of municipalities under Illinois law.

The question here is not whether the decision below is proper, as respondents seem to suppose, but rather it is whether this case presents problems calling for the exercise of supervisory powers of this court. We believe that this case does call for the exercise of this power.

Because there is involved in this case a matter which we believe is of great importance which is not involved in the *Monroe* case, we believe it would be prudent to take this case with Monroe and settle all the common questions and at the same time dispose of the additional question to which we now advert.

II.

Respondents contend that Egan, speaking as a Mayor of a state municipality, derives this right to speak as a mayor from state law and not from the Fourteenth Amendment. We differ, notwithstanding *The Slaughter House* Cases, 321 U. S. 1, and *Snowden* v. *Hughes*, 321 U. S. 91. The question involved is a constitutional question of prime importance not heretofore decided by this Court. It is one which calls for the decision of this Court.

Respectfully submitted,

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